EDITOR'S NOTE

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(2)

Supreme Court, U.S.
FILED

99 68 MAR 22 1999

No.

In THE
SUPREME COURT OF THE UNITED STATES

FAITHE FRANK,
PRO SE **Petitioner,**

Vs.

THE HONORABLE DUANE T. NEARY, REFEREE PRESIDING, PRESIDING SUPERIOR COURT OF THE STATE OF CALIFORNIA, SUPERIOR COURT OF ORANGE, SITTING AS THE JUVENILE COURT, ORANGE COUNTY, ET AL,

Respondents,

APPENDIX TOTHE PETITION

Faithe Frank
In Pro Se
P.O. Box 612
Brea, CA 92822
(714) 844-9850

3 MP

Fourth Appellate District, Division Three, No. G023035
S074834

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

DEC 22 1998

Robert Wandruff Clerk

DEPUTY

In Re BENJAMIN B., A Person Coming Under the Juvenile Court Law
ORANGE COUNTY SOCIAL SERVICES AGENCY, Respondent

v.

FAITHE F., Appellant

Petition for review DENIED.

GEORGE

Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL-4TH DIST DIV 3
FILED
OCT 16 1998
Deputy Clerk

In re BENJAMIN B., a Person Coming Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES AGENCY,

Plaintiff and Respondent,

v.

FAITHE F.,

Defendant and Appellant.

G023035

(Super. Ct. No. J432186)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Duane T. Neary, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

William M. Roth, under appointment by the Court of Appeal, for Defendant and Appellant.

Laurence M. Watson, County Counsel, and Dana J. Stits, Deputy County Counsel, for Plaintiff and Respondent.

Harold LaFlamme and Craig E. Arthur, under appointment by the Court of Appeal, for the Minor.

Faithe F. appeals an order terminating parental rights to her son, Benjamin B. (Welf. & Inst. Code, § 366.26.)[1] She contends the juvenile court should have applied the benefit exception to termination of parental rights. (§ 366.26, subd. (c)(1)(A).) We affirm.

973-5947

* * *

We have considered this case previously. In an unpublished opinion we denied Faithe's writ petition challenging the juvenile court's order referring the matter for a section 366.26 permanency planning hearing. (*Faithe F.* v. *Superior Court* (Feb. 26, 1998) G022446, nonpub. opn.) We will not repeat the facts; they are adequately set forth in our prior opinion. Suffice it to say that two-year-old Benjamin was declared a dependent child and removed from his parents' custody because of severe neglect. Both parents had lengthy histories of mental illness impairing their ability to care for Benjamin. At the combined jurisdictional and dispositional hearing, court-appointed mental health experts reported both parents suffered from mental disorders which rendered them incapable of benefiting from family reunification services. The juvenile court denied reunification services and scheduled the permanency hearing.

Neither parent appeared at the permanency hearing. Their attorneys submitted on the evidence, raised no objections to the reports submitted by the Orange County Social Services Agency (SSA), presented no additional evidence, did not cross-examine the case workers, and did not make any argument. The juvenile court found Benjamin was adoptable and terminated parental rights. Benjamin's father does not appeal.

* * *

Faithe argues the juvenile court should have found termination of her parental rights would be detrimental to Benjamin because she had "maintained regular

---

1 All statutory references are to the Welfare and Institutions Code.

visitation and contact with the minor and the minor would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) We reject her contention.

At the permanency hearing, the juvenile court must select a permanent plan of adoption, guardianship, or long-term foster care. (§ 366.26, subd. (b)(1)-(4).) If the juvenile court finds the minor is adoptable, it *must* terminate parental rights and order placement for adoption *unless* it finds termination of parental rights "would be detrimental to the minor" for one of the reasons specified in section 366.26, subdivision (c)(1), which includes the benefit exception.

The burden was on Faithe to establish the benefit exception applied. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 821; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.) She did not appear at the permanency hearing, did not raise the exception, and provided no evidence to support it. She has waived the argument by failing to raise it below. (See *In re Amanda D.*, *supra*, 55 Cal.App.4th at pp. 819-820.)

Even had Faithe not waived the argument, she has failed in her burden to prove its applicability. "The type of parent-child relationship sufficient to derail the statutory preference for adoption is one in which 'regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. [Citation.]' Such a relationship 'arises from day-to-day interaction, companionship and shared experiences.' [Citation.]" (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; see also *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1420.)

Faithe maintains she had consistent visits with Benjamin. The record shows that after Benjamin was detained in July 1997, the court ordered weekly monitored visitation. As of August 19, the parents were visiting Benjamin for one-half hour, three times a week. On November 3, the SSA case worker reported the parents "consistently" visited Benjamin and they did not do anything inappropriate during the visits. When the juvenile court set the permanency hearing, it ordered monthly monitored visitation. In its

February 23, 1998, report submitted for the March 3 permanency hearing, the SSA reported the parents had one visit with Benjamin on December 10, 1997, and behaved appropriately. "When the visit was over, [Benjamin] kissed and hugged both parents without hesitation and appeared comfortable leaving with staff."

The record does not support Faithe's claim that she maintained regular visitation. Although she had frequent visits during the first three months, she saw him only once during the next four. Furthermore, there is no evidence to establish the benefit prong, which requires the parent prove she occupies a parental role for the child. (*In re Amanda D., supra*, 35 Cal.App.4th at p. 621.) Faithe has not established that "severing the natural parent/child relationship would deprive [Benjamin] of a substantial, positive emotional attachment such that [he] would be greatly harmed" if parental rights were terminated. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) At best the record shows that she had visits with him at which nothing inappropriate occurred. "This is insufficient to deny a child who cannot be returned to [his] parents the secure and permanent home decreed by the Legislature to be in [his] best interests." (*In re Elizabeth M., supra*, 52 Cal.App.4th at p. 324.)

The judgment is affirmed.

WALLIN, J.

WE CONCUR:

SILLS, P. J.

SONENSHINE, J.

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

FAITHE FRANK — PETITIONER

(Your Name)

VS.

Laurence M. Watson, Harold LaFlamme, Craig E. Arthur, Orange County Public Defenders; Michael Hughes Esq.; Peggy Oppendale, Orange County Social Services Agency; Lisa Smith; Cheryl Poynter; Rod Johnson, Lisa Poppins; JIll Tumminia, Kari Sheffield; Ms. Brock — RESPONDENT(S)

PROOF OF SERVICE

I, FAITHE FRANK, do swear or declare that on this date, _____, 19____, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

County counsel laurence watson- P.O. Box 1379, Santa Ana, California 92702

Harold LaFlamme- 2424 N. Grand Avenue, Ste. A, Santa Ana, California 92701

Kari Sheffield; Juvenile Court Administrator; 341 The City Drive; P.O. Box 14169 Orange, California 92613

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH 19, 99

Faithe Frank

(Signature)

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

FAITHE FRANK — PETITIONER

(Your Name)

VS.

Laurence M. Watson, Harold LaFlamme, Craig E. Arthur, Orange County Public Defenders; Michael Hughes Esq.; Peggy Oppendale, Orange County Social Services Agency; Lisa Smith; Cheryl Poynter; Rod Johnson, Lisa Poppins; JIll Tomminia Kari Sheffield; Ms. Brock — RESPONDENT(S)

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Kari Sheffield; Juvenile Court Administrator; 341 The City Drive; P.O. Box 14169 Orange, California 92613

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Faithe Frank June 16, 1999

County of ORANGE

Subscribed and sworn to before me on June 16, 1999 by Faithe Frank

Terri Lynne McCurtis
Comm #1143288
NOTARY PUBLIC CALIFORNIA
ORANGE COUNTY
Comm Exp. June 23, 2001

WITNESS my hand and seal.

Terri Lynne McCurtis

SIGNATURE OF NOTARY

FRANK J. CREMEN
Attorney at Law

302 EAST CARSON
SUITE 1004
LAS VEGAS, NEVADA 89101

Telephone (702) 385-7475
FAX (702) 385-9703

August 11, 1998

Mrs. Sylvia Wolper
P.O. Box 29002
Santa Ana, California 92799

Dear Mrs. Wolper:

I just wanted to write to you concerning my knowledge of the case of your daughter and son-in-law, Seth and Rachelle Frank. Your son, Seth, was charged by means of a grand jury indictment here in Las Vegas in the mid-1980s with several offenses involving his daughter, Faithe. The indictment was challenged by your son-in-law's attorney at the time, Jeffrey Sobel, who took the case to the Supreme Court of this state. The Supreme Court rendered a decision wherein it threw out all of the charges against your son-in-law, Seth, because of the deliberate failure of the State to present to the grand jury that returned the indictment the exculpatory evidence that it knew existed. Thereafter, the State had the opportunity to re-file the charges, but declined to do so.

I recall that the State of Nevada removed Faithe from your daughter and son-in-law's home because of the criminal charges. After the Supreme Court threw out the charges, the State failed to return Faithe to her parents.

Sincerely yours,

Frank J. Cremen

FJC:bjp

APPENDIX-2

CLIFFORD A. DOVER

Attorney At Law
9550 Warner Avenue, Suite 250
Fountain Valley, CA 92708

Telephone (714) 965-1682
Fax (714) 964-2793

March 18, 1998

MRS. SYLVIA WOLPER
P.O. Box 29002
Santa Ana, CA 92799

Re: Guardianship/Adoption of Benjamin Beadle

Dear Mrs. Wolper:

This letter will serve to confirm that I had contracted with Karen and Jeffrey Frank, through you, to represent them in the above-mentioned matter. During my recent conversations with Karen Frank she informed me that she and her husband no longer desired to have me pursue this matter in an adversarial manner against the Department of Social Services.

This decision was made by Karen and Jeffrey after the Department of Social Services apparently recanted their position of recommending that they receive custody of the child. Social Services' position seems to have changed even though Karen and Jeffrey underwent successful background checks, and had demonstrated that they could provide an excellent home environment for the child in their recently purchased home in the City of Corona.

Karen and Jeffrey were apparently told that they could not have the child because of "red flags" regarding the family. Nothing more specific than that was provided to them by Social Services. However, it is apparent from the manner in which Jeffrey Frank was questioned over unfounded allegations of abusing the mother of the child over 10 years ago, when he was twelve and she was about ten years old, that the "red flags" have something to do with incidents which happened when the family was living in Las Vegas.

I further understand that you believe that Social Services may be covering up their desire to not let Karen and Jeffrey have the child because of their mixed-race marriage. You believe that this is the only inference that can be drawn in this regard, and perhaps you may be correct.

APPENDIX-3

However, Karen Frank has advised me that, although they still desire to have the child, they will not subject themselves to an adversarial encounter with Social Services based on unfounded and very old records from the City of Las Vegas.

Mrs. Wolper, I agree that this child has been wrongfully withheld from your family, for whatever reasons or motives that the decision-makers at the Department of Social Services may have. However, as Karen and Jeffrey, the clients whom I represent, do not desire to pursue the matter further, I am left with no option but to withdraw my services at this time. I regret that I could not be of further service.

Sincerely,

Clifford A. Dover

To Whom It May Concern

I Robert G. Lee was a neighbor of Hans & Gunther while Benjamin was living with them.

Benjamin seemed clean and fed and well taken care of. On a few occasions he came over to my house with his parents and play with my cat. The child was having fun and talking to my cat It seemed he was very happy

Thank You

Robert G Lee
1283 Regent Dr
Corona Ca 91720
1(909)371/8897

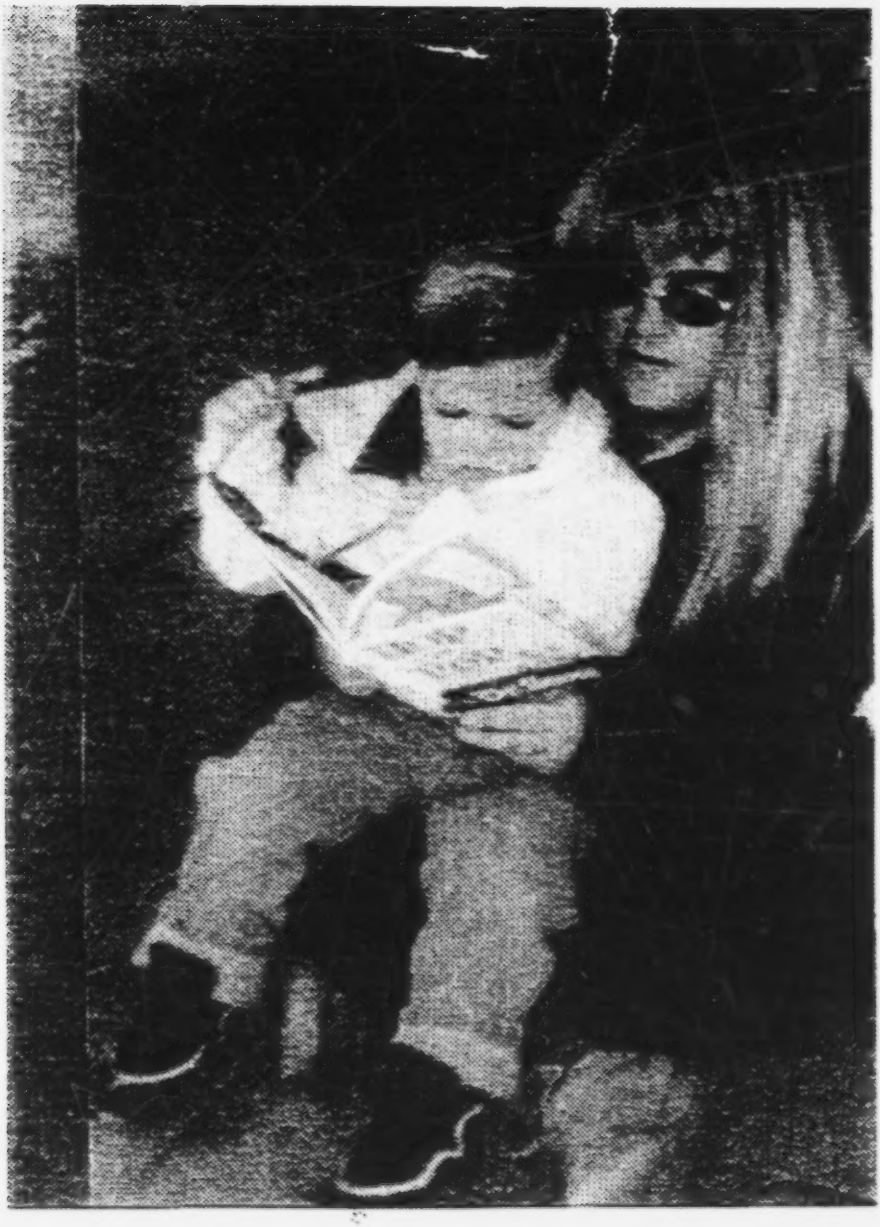
April 28, '90

To Whom It may concern,

I saw Benjamin approximately three times in passing in the neighborhood. I don't recall ever thinking in any way that Benjamin had been abused or neglected.

Sincerely,
Margaret Sims

APPENDIX - 5B



APPENDIX-5b

RISK FOR NEGLIGENCE AND POSSIBLE PHYSICAL ABUSE IF PLACED WITH THIS PARENT,"

WHAT DID YOU MEAN BY THAT?

A IN REGARD TO MOTHER, I WOULD BE -- I AM OF THE OPINION THAT SHE WOULD NEGLECT THIS CHILD'S NEEDS ON A DAILY BASIS AND WOULD NOT BE ABLE TO SUSTAIN ADEQUATE CARE FOR THIS CHILD ON A DAILY BASIS.

FOR A TODDLER, THAT WOULD MEAN CHANGING THE CHILD, FEEDING THE CHILD, HAVING A REGULAR TIME FOR THE YOUNG CHILD.

IT'S MY UNDERSTANDING THIS CHILD ALSO MAY HAVE SOME SPECIAL NEEDS, AND I DON'T KNOW THAT SHE CAN MEET THOSE NEEDS FOR THIS CHILD.

IN REGARD TO THE PHYSICAL ABUSE, I BELIEVE AT TIMES SHE IS PRONE TO BE IMPULSIVE AND NOT EXERCISE GOOD JUDGMENT AND MAY STRIKE THE CHILD.

I DON'T THINK SHE DOES SO WITH A LOT OF PRE-PLANNING OR BECAUSE SHE DISLIKES THE CHILD. IT'S JUST OUT OF FRUSTRATION.

Q WELL, REGARDING THE NEGLECT OF THE CHILD, DO YOU HAVE ANY SPECIFICS IN THE HISTORY THAT YOU GOT FROM THE PARENTS OR FROM THE RECORDS THAT WOULD INDICATE THAT MOTHER HAS IN THE PAST NEGLECTED THE NEEDS OF THE CHILD?

A I BELIEVE IN TERMS OF FEEDING THE CHILD, THAT HAS BEEN A DIFFICULT AREA.

THE CHILD WAS ALSO, I BELIEVE, NOT GAINING

APPENDIX-6

NEIGHT APPROPRIATELY.

HISTORICALLY, SHE HAS FOUND THE CHILD VERY DEMANDING, AND SINCE THE CHILD HAS BEEN VERY YOUNG, HAS SOUGHT ASSISTANCE FROM OTHERS IN CARING FOR THE CHILD.

Q BUT, ARE THERE ANY SPECIFIC EXAMPLES OTHER THAN WHAT YOU HAVE JUST CITED TO US THAT YOU HAVE USED TO COME TO THE CONCLUSION THAT THE MOTHER MIGHT NEGLECT THE CHILD IN THE FUTURE?

WHAT I'M LOOKING FOR, DID SHE EVER LEAVE THE CHILD ALONE UNATTENDED?

A I DON'T RECALL THAT.

I BELIEVE JUST FROM THE INFORMATION OBTAINED FROM HER DURING THE INDIVIDUAL INTERVIEW AND ALSO, AS I INDICATED BEFORE, THE RECORDS, THAT I REVIEWED.

Q REGARDING POSSIBLE PHYSICAL ABUSE, IS THERE ANY INFORMATION YOU HAVE FROM YOUR INTERVIEWS AND REVIEWING THE REPORT THAT HAVE INDICATED IN THE PAST THE MOTHER HAS PHYSICALLY ABUSED BENJAMIN?

A I CAN'T RECALL.

Q THEN, ONCE AGAIN, YOU FEEL THAT THE MOTHER MIGHT BECOME FRUSTRATED IN THE FUTURE AND PHYSICALLY STRIKE THE CHILD?

IS THAT WHAT YOU TESTIFIED EARLIER TO?

A NO. I FEEL THAT THERE IS A HIGH LIKELIHOOD THAT THE MOTHER MIGHT BECOME FRUSTRATED AND BE IMPULSIVE AND STRIKE THE CHILD, HARMING THE CHILD.

Q AND ACCORDING TO THE RECORDS, SHE HAS ALSO IN THE PAST COMPLAINED ABOUT BEING OVERTAXED BY THE NEWBORN; CORRECT?

A YES.

Q AND ANY REPORTS IN THE RECORD THAT SHE HAS PHYSICALLY ABUSED THE CHILD BECAUSE SHE HAS BEEN OVERTAXED?

A I DON'T RECALL.

Q OKAY. DO YOU SEE ANYTHING IN THE RECORDS THAT SHE HAS BEEN PHYSICALLY ABUSIVE TO THIS MINOR?

A FROM BEING OVERTAXED?

Q OKAY. DO YOU SEE ANYTHING IN THE RECORDS, IN YOUR REVIEW OF THE RECORDS OR FROM YOUR INTERVIEW OF THE MOTHER, THAT SHE HAS PHYSICALLY ABUSED THIS CHILD?

A NO, BUT I BELIEVE IT'S QUESTIONABLE.

Q SO, WOULD IT BE FAIR TO STATE THAT NOTHING IN HER PAST HISTORY DEMONSTRATES THAT SHE HAS PHYSICALLY ABUSED THIS CHILD?

MS. BROCK: OBJECTION, LACK OF FOUNDATION.

THE COURT: SUSTAINED.

IT'S ALSO VAGUE. CALLS FOR SPECULATION.

THIS WITNESS DOESN'T KNOW MOTHER'S COMPLETE PAST HISTORY TODAY, AND MAYBE SHE COULD TALK TO IT -- I DON'T KNOW, BUT STAY WITH IT, WITH THE PRESENT THING.

BY MR. BARTOL:

Q HOW DID YOU ARRIVE AT YOUR DIAGNOSIS OF THE MOTHER?

A FROM THE CLINICAL INTERVIEW OF THE MOTHER --

Q DID THAT --

A -- AND THE PSYCHOLOGICAL --

THE COURT: THE WITNESS WAS NOT FINISHED WITH HER ANSWER.

WOULD YOU LET HER FINISH?

MR. BARTOL:- YES, YOUR HONOR I WILL.

BY MR. BARTOL:

Q YOU MAY FINISH.

A THE PSYCHOLOGICAL TESTING AND ALSO THE REVIEW OF THE CLINICAL RECORDS.

Q I'M SORRY. I DIDN'T GET THE LAST PART OF YOUR ANSWER?

A THE PREVIOUS CLINICAL REPORTS AND REVIEW OF THE RECORDS, AND ALSO MEDICAL RECORDS AND THE RECORDS FROM THE DEPARTMENT OF SOCIAL SERVICES.

Q DID THAT INCLUDE ANY REVIEWS OF ANY QUANTITATIVE TESTING THAT WAS PERFORMED UPON HER BY OTHER PSYCHOLOGISTS OR PSYCHIATRISTS?

A NO, IT DID NOT.

I DID REQUEST THAT FROM DR. MEAD-MESSENGER. SHE DID NOT REPLY.

Q YOU DIDN'T PERFORM ANY PSYCHOLOGICAL TESTING OF THE SUBJECT, DID YOU, OF THE MOTHER?

A YES, I DID.

Q OKAY. WHAT TESTS DID YOU PERFORM ON HER?

A YES. I BELIEVE IT WAS THE MATERNAL GRANDPARENT OR GRANDPARENTS AND MATERNAL AUNT AND UNCLE.

Q DIDN'T SHE TELL YOU SHE WAS EXPERIENCING A GREAT DEAL OF DEPRESSION AND ANXIETY BECAUSE OF THE PRESSURE THAT WAS BEING PLACED UPON HER TO GIVE UP THE CARE OF HER CHILD?

A YES.

Q ANYTHING FROM YOUR REVIEW OF THE RECORDS THAT INDICATES THAT THIS CHILD NOW HAD BEEN MALNOURISHED IN ANY WAY

A IT'S MY UNDERSTANDING THAT THE CHILD HAS HAD A PROBLEM EATING AND WILL NOT EAT AND HOLDS AND STORES AT TIMES FOOD IN ITS MOUTH.

Q DO YOU KNOW HOW MUCH THIS CHILD WEIGHS?

A I DON'T RECALL, NO.

Q YOU DON'T -- DO YOU KNOW ANYTHING ABOUT THE CHILD'S PHYSICAL MEASUREMENTS?

A NO.

Q AND SO YOU COULD NOT OFFER AN OPINION AS TO WHETHER OR NOT THE GROWTH OF THIS CHILD WAS WITHIN NORMAL BOUNDS OR NOT?

A CORRECT.

Q FOR A CHILD HIS AGE?

A POSSIBLY. MY RECOLLECTION IS THAT THE CHILD HAD -- WAS DEVELOPING WELL IN ORANGEWOOD AND GAINING WEIGHT.

Q BUT BEFORE THE CHILD WAS TAKEN INTO PROTECTIVE CUSTODY, CAN YOU OFFER ANY KIND OF AN OPINION AS TO WHETHER OR NOT THE CHILD'S GROWTH WAS WITHIN NORMAL LIMITS FOR A CHILD THAT AGE?

A NO.

Q ANYTHING IN THE RECORDS THAT DISCLOSE TO YOU WHETHER OR NOT THIS CHILD HAD EXPERIENCED ANY HEALTH PROBLEMS BECAUSE OF MOTHER'S LACK OF -- BECAUSE OF LACK OF PROPER HYGIENE GIVEN TO HIM BY THE MOTHER?

A NO. I DON'T BELIEVE SO, BUT I AM NOT CERATIN.

Q YOU HAVEN'T HAD AN OPPORTUNITY TO SEE THE PARENTS AND THE CHILD INTERACT AT ALL; HAVE YOU?

A THAT IS CORRECT.

I DID NOT HAVE ANY OPPORTUNITY TO OBSERVE OR INTERVIEW THE PARENTS WITH THEIR CHILD.

Q AND HAVE YOU HAD ANY OPPORTUNITY TO MEET WITH THE MINOR?

A NO. THE REFERRAL SPECIFICALLY REQUESTED AND LIMITED MY EVALUATION TO THE PARENTS.

THE COURT: LET THE RECORD REFLECT THAT DR. YGLESIAS WAS CHOSEN BY THE COURT TO DO A 730 EVALUATION ON THE PARENTS.

BY MR. BARTOL:

Q DOES ANY OF THE MOTHER'S TEST RESULTS FALL WITHIN THE D.S.M. IV CRITERIA FOR SCHIZOPHRENIA?

A NO.

UNIVERSITY OF CALIFORNIA, IRVINE

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

Department of Psychiatry and
Human Behavior

Please Reply to:
Neuropsychiatric Center
Psychiatry Outpatient Clinic
101 The City Drive, Rte. 181
Orange, CA 92668
(714) 456-5902
FAX (714) 456-5112

12.2.98

To whom it may concern

Faith Frank was placed on Temporary Disability during the period of 3/94 → 1/97 for Generalized anxiety Disorder during which she was treated with Zoloft and did not require hospitalization. Currently she is without signs or symptoms of generalized anxiety disorder.

In 7/15/98 Ms. Frank was seen in our clinic and was ruled out for schizophrenia. She was determined to be without any psychiatric diagnoses at that time.

Sincerely,

Gerald A. Maguire, MD

APPENDIX-8

CHARTER HOSPITAL
OF MISSION VIEJO

4/10/96

To Whom It May Concern:

Dawn Frank is on 25mg Vistaril 3 times/da for a generalized anxiety disorder. She is not schizophrenic & is not depressed – so no need for antidepressants. She keeps her appointments and is anxious about the outcome of her court appearance

Dan Schwerdtfeger

DAN SCHWERDTFEGER, M.D.
PSYCHIATRIST

23225 Madero • Mission Viejo, California 92691 • (714) 830-4800 • FAX (714) 830-8545
A member of the Charter Medical Corporation family of quality health care facilities.

APPENDIX-8A

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

Name: Faithe R. Frank SSN: 051-58-5711

Assessment is for: Current Evaluation

Administrative Law Judge's Signature Date

Stephen R. Zovicki, J 6/7/94

I. MEDICAL SUMMARY

A. Medical Disposition(s): Meets Listing 12.04

B. Based Upon Category(ies): 12.04

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[x]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	C.	12.04	Affective Disorders
[ ]	[x]	D.	12.05	Mental Retardation and Autism
[ ]	[x]	E.	12.06	Anxiety Related Disorders
[ ]	[x]	F.	12.07	Somatoform Disorders
[ ]	[x]	G.	12.08	Personality Disorders
[ ]	[x]	H.	12.09	Substance Addiction Disorders

May 1, 1998

To whom it may concern:

My husband and I was seeking custody of our nephew Benjamin Beadle. We went to Social Services for help. A social worker named Lisa Poppins told us we have to wait for the court hearing on March 3rd.

Lisa Poppins told me her job is to reunify the child and parents. Therefore at this time social services can not place Benjamin in our home.

After the court hearing, reunification was denied to Faithe and Gary Beadle. Benjamin was put up for adoption. Benjamin's new Social Worker was Lisa Smith. Lisa Smith informed my husband and I that in order for us to receive Benjamin we have to have our house checked and a home study. Lisa Smith came out to our house. Our house checked out fine. Lisa than told me we need to visit Benjamin. After a few visits Social Service would do an over-night visit. Lisa Smith gave my husband and I our home study social worker Jill Tumminia.

We did everything that was asked of us. We went on vacation and was informed that we had to call a doctor that social services appointed to the case. While we were on vacation. We took time out of our vacation to do so. Anything to try and get Benjamin.

We meet with Jill Tumminia. Jill asked me general questions about me and my family. According to my husband, when Jill spoke to him she asked alot of qusetions about his family. Which my husband felt did'nt have anything to do with the case. Jill at this time told us that her investigation on us would take approximately another 6 months. We put our life on hold for 8 months waiting for Benjamin. From our understanding, after the hearing on March 3. 98 we should not have any problems getting Benjamin.

APPENDIX - II

After Jill told us we had to wait another 6 months, I asked her why? Jill told me that there was some RED FLAGS on some of the family members that had to be checked out. I felt we waited 8 months, and within those 8 months my husband and I was checked out fine. We did'nt want to wait another 6 months, so we told Jill we did'nt want the child.

I called Jill a week later. I asked her if it was any way we could get Benjamin without waiting the 6 months. Jill told me that since I called, social services closed our files and we would still have to wait 6 months. After that Jill asked me if I wanted to speak to her supervisor? Jill directed me to a Mr. Johnson. Mr. Johnson told me that Social Services felt that my husband and I was presured into taking Benjamin. Mr. Johnson told me that Social Services would not put Benjamin or any other child in our home.

Mr. Johnson treated my husband and I as if we're criminals. My husband and I are law abiding citizens. We have not done anything wrong. We tried to help a family member that is in trouble by opening our home. But, instead we were treated like we did the child harm. Is this what you call justice? I think not!

Sincerely,

Jeffrey and Karen Frank

[4, 5] We further note that a resolution of this case on a Rule 12(c) motion was inappropriate. A Rule 12(c) motion is designed to provide a means of disposing of cases when material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings.[3] 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1367 (1969). The motion for a judgment on the pleadings has utility only when all material allegations of fact are admitted in the pleadings and only questions of law remain. *Id. See also Duhame v. United States*, 127 Ct.Cl. 679, 119 F.Supp. 192 (1954). Moreover, a defendant will not succeed on a motion under Rule 12(c) if there are allegations in the plaintiff's pleadings that, if proved, would permit recovery. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 (1969). In Count II of their complaint, the Bernards alleged that Rockhill fraudulently misrepresented its intention to perform when it induced them to execute the release and agreement. Rockhill's denial of the allegations precluded the district court from granting Rockhill's motion for judgment on the pleadings. The pleadings did not resolve all the material issues of fact in this case; there was a substantive dispute involving Rockhill's tort liability that would justify a trial of the issue. Rockhill was not entitled to judgment as a matter of law. We therefore reverse the order of the district court granting Rockhill's motion for a partial judgment on the pleadings and reinstate Count II and Count III of the Bernards' complaint.

3. NRCP 12(c) provides:
After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

SHERIFF, CLARK COUNTY, Appellant,

v.

Seth FRANK, Respondent.

No. 17671.

Supreme Court of Nevada.

March 31, 1987.

Defendant, charged by indictment with one count of lewdness with minor and one count of sexual assault on child, petitioned for writ of habeas corpus, seeking dismissal of indictment with leave for state to proceed anew in proper fashion. The Eighth Judicial District Court, Clark County, Joseph S. Pavlikowski, J., granted petition, and state appealed. The Supreme Court held that: (1) deputy district attorney improperly withheld exculpatory evidence from grand jury, and (2) actions of deputy district attorney, coupled with admission of hearsay evidence, irreparably impaired proper performance of grand jury's mission to pursue its investigation independently of prosecuting attorney, warranting requested relief.

Affirmed.

1. Grand Jury ⇐36.8

Deputy district attorney violated statutory duty to submit any evidence which would explain away lewdness with minor and sexual assault on child charges by failing to present to grand jury evidence that victim made false accusations of sexual misconduct against other individuals and by actively discouraging grand jury from receiving and exploring evidence of prior false accusations. N.R.S. 172.145, subd. 2, 200.366(2)(c), 201.230.

APPENDIX-13

2. Habeas Corpus ⇐25.1(3)

Deputy district attorney's failure to submit exploratory evidence, coupled with substantial body of inadmissible evidence received by grand jury, clearly destroyed existence of independent and informed grand jury and irreparably impaired its function, warranting district court to issue writ of habeas corpus with leave for state to proceed anew in proper fashion, with respect to charges of lewdness with minor and sexual assault on child. N.R.S. 172.135(2), 172.145, subd. 2, 200.366, 201.230.

Rex Bell, Dist. Atty., Las Vegas, for appellant.

Jeffrey D. Sobel, Las Vegas, for respondent.

OPINION

PER CURIAM:

Respondent, Seth Frank, was charged by ı indictment filed March 21, 1986, with ıe count of lewdness with a minor and ıe count of sexual assault on a child un- r the age of fourteen. *See* NRS 201.230; RS 200.366(2)(c). Prior to trial, respon- nt challenged the indictment by way of a tition for a writ of habeas corpus. ıong other contentions, he argued that : indictment was invalid because the dis- ıt attorney (1) improperly withheld excul- ory evidence from the grand jury; and allowed inadmissible testimony to be sented to the grand jury. The district rt agreed and granted respondent's pe- n which sought dismissal of the indict- t with leave for the state to proceed v in a proper fashion. The state ap- s. For the reasons set forth below, we m the order of the district court.

THE FACTS

1985; the alleged victim, respondent's n-year-old daughter, attended a coun- -oriented special education program ted by the Clark County School District. The program is designed for children whose learning abilities are impeded by social or emotional problems. As a result of certain allegations made by the daughter in a homework assignment, the school authorities requested the police to investigate the child's accusations that she had been the victim of sexual abuse. Thereafter, in interviews with Detective Crawford, the daughter alleged that her father, her thirteen-year-old brother, and an adult male neighbor had sexually abused her. As a result of these statements, the child was placed in protective custody in a foster home, and grand jury proceedings were instituted.

Prior to the grand jury proceedings, a custody hearing was held in juvenile court in which the daughter recanted her accusations against her brother and the neighbor. She specifically testified that she had not told the truth regarding those accusations. She later testified before the grand jury, however, that her father had touched her on her chest and genitals and had subjected her to fellatio. During her testimony before the grand jury, the deputy district attorney, Mr. Jeffers, did not question her regarding her prior accusations against her brother and the neighbor. In essence, in her brief appearance before the grand jury, she merely related her allegations against her father.

The grand jury, however, received a substantial amount of testimony from numerous other witnesses. In addition to his claims regarding the deputy district attorney's failure to submit exculpatory evidence to the grand jury, respondent also argued in his petition below that much of the testimony that was presented was inadmissible and highly inflammatory hearsay evidence. For example, Detective Crawford testified that during her initial interviews with respondent's daughter, the child "indicated to [her] that she was having some problems at home, that she was very frightened of her father and that the reason for that is because he sometimes hit her and hit her brother, but mostly because

he touched her in private places and that made her very sad...." Crawford also stated her opinion that the daughter was telling her the truth.

At another point during Crawford's testimony, a juror asked if the daughter had ever made any accusations against her brother. When Crawford answered "Yes," the deputy district attorney interrupted the testimony, stated that he did not believe this evidence was relevant, and asked the grand jury to disregard it. Further, the deputy stated, "We're getting into an offense even if it did occur, it is something that is held in juvenile court and we have absolutely no jurisdiction to get into it."

The grand jury, however, did receive some evidence of the false accusation against the brother, primarily from respondent during his testimony. Specifically, respondent testified that he and his s[illegible] both passed polygraph examinations concerning the accusations. Respondent stated that polygraph tests "were done on my 13-year-old son and myself" and that he and his son were "accused of the same identical charges, sexual assault and lewdness with a minor." The deputy district attorney responded to this statement by inquiring, "How did your son get in here? We haven't presented any evidence. Did he do something, too?" Respondent then indicated that he was simply trying to explain that his daughter had initially accused them both. Later, respondent testified that his daughter had recanted the charges against his son.

Additionally, the deputy district attorney discouraged the grand jury from accepting evidence of the son's polygraph exam. Specifically, the deputy stated, "[t]hese two polygraph examinations, if the foreman wants them in, I would say that whatever the young boy did or didn't do is not a matter of concern to this Grand Jury. That's something handled by Juvenile Court and nothing this Grand Jury could entertain there, if they wanted to, so I don't think its material." The deputy went on to explain, however, that the jury could consider the tests for "something that would tend to explain away guilt." Nonetheless, at the conclusion of respondent's testimony, the grand jury accepted only the polygraph test of respondent. Specifically, the foreman stated "I would think that any evidence, ... with regard to the son, would not necessarily be relevant to anything we are discussing...."

We further note that counsel for respondent offered to produce respondent's son as a witness who could relate exculpatory testimony to the grand jury. The deputy district attorney, however, indicated to the grand jury that he felt it would be improper to bring the young boy in "to testify in here when it possibly might involve juvenile matters pending against him." Instead, the deputy told the grand jury that respondent's counsel had indicated to him in the presence of the grand jury foreman that the essence of the boy's testimony would be to corroborate respondent's contention that the daughter had threatened to "get even" with respondent and his son for "laughing at her." The deputy, however, did not inform the jury that the girl had recanted her accusations against the son in sworn testimony during the prior custody proceedings, and that this might be evidence which could explain away respondent's guilt. Additionally, our review of the record reveals no indication that the deputy district attorney ever informed the grand jury that the daughter had made and later recanted accusations against a neighbor.

Respondent also testified extensively before the grand jury that he suspected that his daughter's teacher was actually the one who had abused his daughter. In this regard, the deputy district attorney called attorney John Lukens, ostensibly to present evidence which would tend to explain away respondent's guilt. Lukens was appointed by the juvenile court to act as an investigator on behalf of the court and as counsel for the daughter during the juvenile proceedings. As such, he investigated the allegations that the daughter's teacher

may have actually molested the child. Lukens' testimony recounted statements made by a parent and grandparent of one of the daughter's classmates to the effect that the teacher was "just absolutely tremendous" and that they wished that the girl could still be in the teacher's class because she was "the best." Lukens further stated that there was "simply nothing to any of those allegations that had been made." Despite the deputy district attorney's admonishment to the grand jury that this hearsay testimony was being presented only as evidence that could be considered to explain away respondent's guilt, it appears that the testimony, in reality, was directed at destroying respondent's credibility and building the state's case.

Further, we note that the grand jury spent a substantial amount of time exploring some disturbing facts surrounding Mike Barbutti's tangential involvement in this matter. Barbutti is a Las Vegas radio personality. He testified that respondent's daughter frequently called him at the radio station to request songs and talk. According to Barbutti, after the child was removed from her parents' custody, the family requested that he look into the matter. Thereafter, Barbutti received a list of names and a note from an anonymous source indicating that the people on the list would have information on the case. Apparently, Barbutti's investigation focused on the teacher's involvement in the matter. Barbutti stated that after he had contacted some of the people on the list, an unknown individual delivered an envelope to him. Apparently, this individual told Barbutti that there was $5,000 in the envelope and that Barbutti would receive $45,000 more if he dropped the investigation. Barbutti told the grand jury that the envelope actually contained only $3,900 and that he had spent the money, and misplaced the list.

At the conclusion of the grand jury proceedings, the deputy district attorney informed the jurors that he had "tried to present to you all the evidence that I thought even might be described as something that would explain away guilt." He further attempted to admonish the jurors that some of Detective Crawford's testimony was "not for the truth of the matter, but merely to explain how she got into the mainstream of the investigation," and that he felt that Crawford was qualified, based upon her experience and background, to offer her opinion as to the truthfulness and credibility of the daughter. Thereafter, on March 20, 1986, the grand jury returned its indictment against respondent.

THE LAW

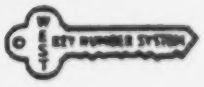
[1] NRS 172.145(2) provides that "[i]f the district attorney is aware of *any* evidence which will explain away the charge, he *shall* submit it to the grand jury." (Emphasis added.) As noted above, respondent argued that the deputy district attorney violated his duty under NRS 172.145(2) by failing to present to the grand jury "conclusive proof that [the daughter] made deliberately false accusations of sexual misconduct against other individuals" at the same time that she was making similar accusations against her father. We agree. In our view, the evidence regarding the daughter's prior false accusations, made at the same time she also accused her father, has a tendency to explain away the charge against respondent. By failing to submit this evidence to the grand jury, the district attorney violated his duty dictated by the plain, unambiguous language of NRS 172.145(2).

Moreover, we conclude that the deputy district attorney not only failed to present the exculpatory evidence, but he also actively discouraged the grand jury from receiving and exploring evidence of the prior false accusations, particularly in regard to the accusation against respondent's son. The grand jury's "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *See United States v. Dionisio*, 410 U.S. 1, 16–17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973). Of course, we express no opinion as to the guilt or innocence of respondent in this matter. We

observe, however, that accusations of this nature "tend to inflame persons of normal sensibilities." *See Sheriff v. Miley*, 99 Nev. 377, 385, 663 P.2d 343, 348 (1983) (Gunderson, J., dissenting). Where, as here, "a prosecutor refuses to present exculpatory evidence, he, in effect, destroys the existence of an independent and informed grand jury." *See United States v. Gold*, 470 F.Supp. 1336, 1353 (N.D.Ill.1979); *see also Johnson v. Superior Court of San Joaquin County*, 15 Cal.3d 248, 124 Cal.Rptr. 32, 539 P.2d 792 (1975). We conclude, therefore, that in this particular instance the actions of the deputy district attorney, coupled with the admission of hearsay evidence as discussed below, irreparably impaired the proper performance of the grand jury's mission to pursue its investigation independently of the prosecuting attorney. *See United States v. Dionisio*, 410 U.S. at 16–17, 93 S.Ct. at 773.

[2] As noted, respondent also argued below that the indictment was tainted by the fact that the deputy district attorney allowed numerous witnesses to present inadmissible and highly inflammatory hearsay evidence. Specifically, respondent objected to the testimony referred to above of Detective Crawford and attorney Lukens. NRS 172.135(2) provides that "[t]he grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." The state did not contradict respondent's allegation that inadmissible evidence was presented to the grand jury. Instead, it argued that a sufficient amount of admissible evidence was presented to sustain the indictment. *See, e.g., Robertson v. State*, 84 Nev. 559, 561–562, 445 P.2d 352, 353 (1968) (regardless of presentation of inadmissible testimony, if there is the slightest sufficient legal evidence and best in degree, the indictment will be sustained). While we continue to adhere to the general rule announced in *Robertson*, under the circumstances of this case, we conclude that the district attorney's failure to submit exculpatory evidence, coupled with the substantial body of inadmissible evidence received by the grand jury, clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function. *See United States v. Gold*, 470 F.Supp. at 1353; *see generally Gibbons v. State*, 97 Nev. 299, 629 P.2d 1196 (1981) (judgment of conviction reversed where jury's deliberations at trial were unduly prejudiced and influenced by admission of improper evidence).

Finally, we note that respondent's petition specifically requested the district court to issue a writ of habeas corpus with leave for the state to proceed anew in a proper fashion. Under these circumstances, we conclude that the district court properly granted respondent's petition. In light of our conclusion in this regard, our consideration of the additional ground which respondent asserted in support of his petition below is unnecessary. Accordingly, we affirm the order of the district court granting respondent's petition.



The PUBLIC SERVICE COMMISSION of the State of Nevada, Appellant.

v.

SIERRA PACIFIC POWER COMPANY, Respondent.

No. 17436.

Supreme Court of Nevada.

March 31, 1987.

Public utility sought judicial review of decision of Public Service Commission,

CHAPTER 172.

PROCEEDINGS AFTER COMMITMENT AND BEFORE INDICTMENT.

GENERAL PROVISIONS

Sec.
172.005. Definitions.
172.015. Prosecution of public offenses.
172.025. Prosecution by accusation.
172.035. Accusations, indictments and informations to be found or filed in district court.

FORMATION OF GRAND JURY

172.045. Impaneling grand juries.
172.047. Grand jury impaneled for specific limited purpose.
172.055. Challenges to grand jury and to grand jurors: How made and tried.
172.065. Motion to dismiss presentment or indictment based on objections to grand jurors.
172.075. Officers of grand jury.
172.085. Oath of grand jurors.
172.095. Charges to be given to grand jury by court; district attorney to inform grand jury of specific elements of public offense considered as basis of indictment.
172.097. Supervision of grand jury by impaneling judge; limitations on and review of expenditures: monthly statement by county treasurer.

POWERS AND DUTIES OF GRAND JURY

172.105. Powers.
172.107. Limitations on use of grand jury.
172.115, 172.125. Transferred.
172.135. Evidence receivable before grand jury.
172.137. Affidavit of owner, possessor or occupant of property; notice required; request by grand jury to produce witness.
172.139. District attorney and grand jury prohibited from questioning attorney regarding matters he learned for client or issuing subpoena for work done by attorney for client.
172.145. Grand jury required to hear and district attorney required to submit known evidence which will explain away charge; invitations and issuance of process for witnesses.
172.155. Degree of evidence to warrant indictment; objection.
172.165. Grand juror must declare knowledge as to commission of public offense: investigation.
172.175. Matters into which grand jury shall and may inquire.
172.185. Grand jury entitled to enter jails and examine records.
172.195. Issuance of subpoenas by grand jury; subpoenaed witnesses must be informed of general nature of inquiry.
172.197. Procedure when person subpoenaed to appear before grand jury intends to assert his constitutional privilege against self-incrimination.
172.205. Power to engage services of skilled persons.
172.215. Certified court reporter: Appointment: compensation: material required for and prohibited from inclusion in notes.
172.225. Transcripts: Preparation; public record.
172.235. Who may be present when grand jury is in session.
172.239. Legal counsel for certain persons who appear before grand jury.
172.241. Right of certain persons to appear before grand jury; notice of consideration of indictment: withholding of notice.
172.245. Secrecy of proceedings of grand jury; permitted disclosures; penalty.
172.255. Finding and return of presentment or indictment; effect of failure to indict.
172.259. Publication of fact that no indictment was issued by grand jury.
172.265. Names of witnesses inserted or endorsed at foot of indictment.
172.267. Report of grand jury: Scope; purpose: limitations.
172.269. Report of grand jury: Inclusion of recommendations to public officers or agencies; criticism must be constructive; positive statement of no indictable activity required, if applicable.
172.271. Report of grand jury: Preliminary review by court; notification of identified persons: procedure to expunge improper material: filing and distribution.

MISCELLANEOUS PROVISIONS

172.275. Discharge of grand jury; discharge or excuse of juror.
172.285. Warrant on presentment.
172.295. Review by person of his own prior testimony before he testifies before grand jury again.

POWERS AND DUTIES OF GRAND JURY

172.225. Transcripts: Preparation; public record.

CASE NOTES

Due process not denied. — Where the defendant contended that his right to due process was violated because the district court refused to grant his motion for a continuance of his arraignment because he was not given a copy of the grand jury transcript, the defendant failed to show any prejudice, and the defendant was not denied his right to due process. Lisle v. State, 113 Nev. —, 937 P.2d 473 (1997).

172.241. Right of certain persons to appear before grand jury; notice of consideration of indictment; withholding of notice.

1. A person whose indictment the district attorney intends to seek or the grand jury on its own motion intends to return, but who has not been subpoenaed to appear before the grand jury, may testify before the grand jury if he requests to do so and executes a valid waiver in writing of his constitutional privilege against self-incrimination.

2. A district attorney or a peace officer shall serve reasonable notice upon a person whose indictment is being considered by a grand jury unless the court determines that adequate cause exists to withhold notice. The notice is adequate if it:

(a) Is given to the person, his attorney of record or an attorney who claims to represent the person and gives the person not less than 5 judicial days to submit his request to testify to the district attorney; and

(b) Advises the person that he may testify before the grand jury only if he submits a written request to the district attorney and includes an address where the district attorney may send a notice of the date, time and place of the scheduled proceeding of the grand jury.

3. The district attorney may apply to the court for a determination that adequate cause exists to withhold notice if he:

(a) Determines that the notice may result in the flight of the person whose indictment is being considered, on the basis of:

(1) A previous failure of the person to appear in matters arising out of the subject matter of the proposed indictment;

(2) The fact that the person is a fugitive from justice arising from charges in another jurisdiction;

(3) Outstanding local warrants pending against the person; or

(4) Any other objective factor;

(b) Determines that the notice may endanger the life or property of other persons; or

(c) Is unable, after reasonable diligence, to notify the person.

4. If a district attorney applies to the court for a determination that adequate cause exists to withhold notice, the court shall hold a closed hearing

Mr. Terry L. Smith
#J-107
3400 Avenue Of The Arts
Costa Mesa, CA 92626-1962

June 30, 1999

To whom it may concern;

As a concerned party I was asked to write a brief notes stating my observations of Faith and Gary's baby boy Benjamin. I was and still am employed as a full-time maintenance man at the Lakes at South Coast where I met Mr. & Mrs. Frank. I was called to their apartment on several occasions for routine maintenance and had opportunities to observe Benjamin in his home environment. I never saw any abuse of any kind verbal, mental or physical and if anything Benjamin seemed to flourish under his parents protection. He always appeared clean nourished, and quite happy. Frankly I was stunned to learn 2 years ago that

Mr. Terry L. Smith
#J-107
3400 Avenue Of The Arts
Costa Mesa, CA 92626-1962

Benjamin, was being taken from Gary and Faith. I have no choice but to feel a great travesty of justice has been committed here. Mr. & Mrs. Stark have shown to me to be very supportive parents and more than able to meet Benjamin's needs. I am appalled to learn that they are not permitted to see Benjamin even to this day. Surely as God loving individuals Gary and Faith should be and deserve to be reunited with Benjamin, this is how God has intended it to be without outside intervention.

Please contact me at will if I can help forge the reuniting of this family.

Sincerely,

Terry L. Smith